No. 80-180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

W. C. MCDANIEL, *et al.*,
Petitioners,

v.

JOSE SANCHEZ, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law seeks leave to file the annexed brief as *amicus curiae*. The respondents have consented to the filing of such brief, but the petitioners have not.

The Lawyers' Committee was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Committee; it has pro-

vided legal representation to litigants in numerous voting rights cases for the past fifteen years.*

This case presents issues as to the procedure to be followed by a district court after it finds constitutional defects in the election system of a governmental agency which is within the coverage of the Voting Rights Act of 1965, as amended in 1975. The case has importance beyond its immediate facts because the ruling of the Court will affect future litigation in this area. In our view, the issue presented is both simpler and more basic than the issue as to whether the system devised after the initial ruling of the district court is properly characterized as legislative or judicial action. It is our view that the court below was correct in ruling that the district court should not have approved the plan offered by the defendant without clearance under Section 5 of the Voting Rights Act, whether or not the plan is deemed legislative or judicial. That, as we explicate in the annexed brief, was the understanding of Congress when it reenacted Section 5 of the Voting Rights Act and made it applicable to the region here involved in 1975.

We believe that we can present a perspective on the case which has not been presented by the petitioners and which may not be presented by respondents as to the procedure by which such intention of Congress can be implemented in accordance with the principles established by decisions of this Court.

The Lawyers' Committee accordingly seeks leave to file this brief as *amicus curiae* urging affirmance of the judgment below.

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* For example, the Lawyers' Committee represented a class of black citizens of Mississippi in reapportionment litigation which was before this Court on several occasions: *Connor* v. *Johnson*, 402 U.S. 690 (1971); *Connor* v. *Williams*, 404 U.S. 549 (1972); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Connor* v. *Coleman*, 425 U.S. 675 (1976); *Connor* v. *Finch*, 431 U.S. 407 (1977); *Connor* v. *Coleman*, 440 U.S. 612 (1979); *id.*, 441 U.S. 792 (1979); *United States* v. *Mississippi*, 48 U.S.L.W. 3530 (February 19, 1980).

WHEREFORE, the Lawyers' Committee for Civil Rights Under Law respectfully moves that its brief be filed in this case.

Respectfully submitted,

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The interest of the Lawyers' Committee for Civil Rights Under Law in this matter is set out in the Motion for Leave to File this brief which is appended hereto.

STATEMENT

The essential facts are undisputed. In January, 1978, plaintiffs filed a class action challenging the method by which commissioners were elected to the Commissioners Court of Kleberg County, Texas. That court, consisting of a county judge and four commissioners, is the governing body of the county. The judge is elected county wide, but one commissioner is elected in each of the four precincts into which the county is divided. The commissioners serve staggered terms of four years, with two commissioners elected every two years.

Plaintiffs alleged that the precincts of Kleberg County, as constituted, violated the principle of "one man, one vote," and that the boundaries were drawn in a way which unconstitutionally diluted the votes of Mexican Americans.

After a trial, the district court found that there had been no unconstitutional dilution of the voting strength of Mexican Americans, but that reapportionment was necessary to correct population disparities. In its order of October 22, 1979, the court directed the defendants to submit a proposed new plan by November 13, 1979 and scheduled a hearing thereon for December 10, 1979.

At the hearing on December 10, the county presented to the court a plan which had been prepared by Dr. Robert T. Nash of the business school of Texas A & I University. The Commissioners had officially adopted Dr. Nash's proposal as the plan they would submit to the court. The plaintiffs, offering expert testimony, objected to the manner in which the plan distributed Mexican Americans among the four precincts, and argued that the plan should have been subjected to pre-clearance under Section 5 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973c (1976)). The district court held that pre-clearance was not required because the plan was

court-ordered, rather than legislative. Finding that the proposed plan remedied the malapportionment previously found, it directed that the 1980 primary and general elections should be conducted thereunder.

The court of appeals reversed, holding that the plan proposed by the County was subject to clearance under Section 5 of the Voting Rights Act, and that the district court erred in considering the constitutionality of the proposed plan before such clearance. *Sanchez* v. *McDaniel*, 615 F.2d 1023 (5th Cir. 1980). It relied on that portion of Justice White's opinion in *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978), which stated that, after finding an existing apportionment scheme unconstitutional, a federal court should afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure, rather than for a federal court to devise and order into effect its own plan. The court of appeals also ruled that a proposed reapportionment plan does not lose its status as a legislative plan merely because it is the product of litigation conducted in a federal forum.

SUMMARY OF ARGUMENT

The decision of the court below was correct, whether the plan at issue be deemed legislative or judicial.

1. Precise analysis, we believe, leads to the conclusion that the initial error of the district court lies in that part of its order of October 2, 1979 which directed the county to present a plan to the court in November, subject to a hearing in December, 1979. Under the decisions of this Court, after finding the existing system unconstitutional, the district court should have directed the county itself to fashion an appropriate plan pursuant to law. The plan drawn by the county, to be lawful, would have to be cleared under Section 5. Only thereafter

would the court be required to rule on its constitutionality, if a controversy between the parties continued. Congress, in extending Section 5 and making it applicable to the jurisdictions (including Texas) newly covered by the 1975 amendments, expressed its understanding that Section 5 would operate in this manner.

There are no circumstances in this case which would render inappropriate this traditional remedy which has the approval of numerous decisions of this Court. While some delay would result from the need for clearance, and possibly from the time limitations on changes in Texas law, the considerations which led Congress to prescribe the Section 5 clearance procedure would compensate for the delay. Moreover, the district court would have the power to order such interim relief as it deemed appropriate.

2. Even if the order of October 2 be accepted as correct, and as directing a judicial, rather than a legislative, plan, the district court should be held to have abused its discretion in putting the plan proposed by the county into effect without clearance. Congress intended Section 5 to apply, except under the most exigent circumstance, even where a plan was court ordered. It deemed it important that plans proposed by legislative bodies in the jurisdictions covered by the Voting Rights Act be examined by either the Attorney General or the District of Columbia Court, both because of their expertise and because they would not be subject to local pressure. These considerations apply whether the plan be adopted by the legislature initially or pursuant to court order. The possibilities of delay envisioned by petitioners could be controlled by the courts' power to order prompt action and to order interim relief, if needed.

ARGUMENT

The court below has held that the district court, after finding malapportionment, should not have considered the constitutionality of the new plan proposed by the county until the plan had been cleared under Section 5 of the Voting Rights Act as amended (42 U.S.C. § 1973c (1976)). As petitioners themselves recognize in their brief, the basic question in this case is the validity of that ruling, rather than the more legalistic question presented in their petition as to whether the plan should be deemed legislative or judicial action. We agree with petitioners (Pet. Br. 33) that "Section 5 applicability cannot be determined by resort simply to cases in which plans have been labeled 'court-ordered' or 'legislative' for these terms have been employed most frequently in cases in which the issue was the substantive acceptability of a reapportionment." It is our position that the district court should not have put the plan proposed by the county into effect until after it had been cleared under Section 5, regardless of whether the plan be deemd legislative or judicial.

I. ON FINDING MALAPPORTIONMENT, THE DISTRICT COURT SHOULD HAVE ORDERED THE COUNTY TO PREPARE A PROPER CORRECTIVE SYSTEM PURSUANT TO LAW WHICH WOULD HAVE INCLUDED CLEARANCE UNDER SECTION 5.

Since the time that this Court held, in *Baker* v. *Carr*, 369 U.S. 186 (1962), that federal courts have jurisdiction to determine claims of unconstitutional malapportionment, this Court has repeatedly ruled that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites

in a timely fashion after having had an adequate opportunity to do so." *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964); *see also Burns* v. *Richardson*, 384 U.S. 73, 84-85 (1966); *Gaffney* v. *Cummings*, 412 U.S. 735, 749 (1973); *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975), *Connor* v. *Finch*, 431 U.S. 407, 414 (1977); *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 535-39. As Justice White said in his opinion in *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 540:[1]

> When a federal court declares an existing apportionment scheme unconstitutional, it is, therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution.

In our view, the basic error of the district court in this case lies in its failure to follow this fundamental directive. The district court, after finding malapportionment, instead of directing the county to submit a proposed new plan to it in November, should have directed the county to reapportion itself pursuant to law, reserving only the right to pass on the final plan after the legislative process was completed.[2]

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[1] While the quotation is from Justice White's opinion for himself and Justice Stewart, the principle is recognized in the opinon of Justice Powell, for himself and three additional Justices. See 437 U.S. at 548. Justice Marshall, who dissented in *Wise*, has recognized the general validity of the ruling in *Chapman* v. *Meier*, *supra*, that corrective measures should first be left to the legislature. *See Connor* v. *Coleman*, 440 U.S. 612, 622 (1979).

[2] The fact that plaintiffs did not appeal from the interlocutory order of October 2, 1979 in this respect (when the main thrust of the order, *i.e.*, that reapportionment was necessary, was in their

Had it done so, it is undisputed that the plan adopted by the legislature would have been subject to clearance under Section 5 of the Voting Rights Act. *Connor* v. *Finch, supra*, 431 U.S. at 412; *Connor* v. *Waller*, 421 U.S. 656 (1975). This Court has repeatedly held that clearance under Section 5 must be obtained in covered jurisdictions (which admittedly include Texas) even though the proposed change affects the system in only a minor way and was undertaken for reasons other than discrimination. *Perkins* v. *Matthews*, 400 U.S. 379, 387 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544, 566 (1969). If the district court had followed the repeated directions of this Court to keep the judiciary out of the legislative process as much as possible, the county could have decided whether it wished to follow Professor Nash's proposed plan and then submitted it to the Attorney General or the District of Columbia Court under Section 5. Only after such clearance would it be necessary to pass on any constitutional challenge to the legislative plan that might remain. Such a result is consistent with the Congressional understanding of how Section 5 would operate. As we discuss in detail below, Congress, when it extended the Voting Rights Act in 1975, made

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favor) does not preclude consideration of the validity of that order now. An appeal from a final judgment brings up all interlocutory orders, even if the earlier order could have been, but was not appealed. *Drayer* v. *Krasner*, 572 F.2d 348, 353 (2nd Cir.), *cert. denied*, 436 U.S. 948 (1978), and cases cited.

Although the court of appeals, in reaching a correct result, did not explicitly base its decision on the ground that the district court erred initially in failing to direct the county to correct the malapportionment legislatively (and therefore subject to Section 5 clearance), that ground for decision is encompassed in the court's holding that Section 5 clearance was required before the plan could go into effect. In any event, the issue, which is apparent on the record, is sufficiently important to warrant consideration by the Court. *See Schlesinger* v. *Councilman*, 420 U.S. 738, 743 (1975).

explicit its understanding that Section 5 would apply to plans which resulted from court orders, except in urgent circumstances. S. Rep. No. 94-295, 94th Cong., 1st Sess. 18-19, *reprinted in* [1975] U.S. CODE CONG. & ADM. NEWS 784-86.

There are, in this case, no circumstances which militate against the application of the principle, as phrased in Justice White's opinion in *Wise* v. *Lipscomb*, *supra* (437 U.S. at 539), that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt." Petitioners assert that since, under Texas law, changes in the election precincts of a county may be made only during a July or August Term (*Wilson* v. *Weller*, 214 S.W.2d 473 (Tex. Ct. Civ. App. 1948)), "they were prohibited from reapportioning the county in the manner in which it was done, at the time it was prepared." (Pet. Br. 16).[3] They do not, however, and cannot argue that they are without power to make a proper legislative reapportionment at the proper term. At most, Texas law would prohibit the county's plan from becoming effective except during the specified months. The federal district court would clearly have authority to direct the district court to exercise its legislative judgment and submit the plan which it wished the county to adopt for clearance

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[3] Although the proper construction of Texas law was not decided below, *Wilson* does not appear to determine the authority of county commissioners to redistrict only *commissioners' precincts* outside the July or August Term. *Wilson* involved redistricting of both commissioners' and election precincts, *see* 214 S.W.2d at 474. The issue before this Court does not turn on the distinction, because the federal courts possess adequate equity power to remove temporary state law impediments to complete relief. But if the county commissioners do have authority to alter *commissioners' precincts* at any time under Texas law, then it would not even be necessary here for the district court to enter the sort of temporary relief we suggest in text, *infra*.

under Section 5, whether or not, under Texas law, the county had power to put the plan into effect at a time other than the term specified by state law. *See Burns* v. *Richardson*, *supra*, 384 U.S. at 85; *see also Wise* v. *Lipscomb*, *supra*, 437 U.S. at 548-49 (opinion of Powell, J.). The district court should have ordered the county to adopt a plan, and submit it for preclearance under Section 5, reserving the right then to pass on the constitutional challenge which might remain. The plan could then become effective at a proper time under Texas law.

Such a ruling would involve some delay beyond the December date for which the district court scheduled a hearing, but not necessarily any very great delay. The district court could have ordered the county to devise a plan and submit it to the Attorney General or District of Columbia Court for clearance by a date certain. If the Attorney General did not find the plan objectionable within 60 days, the plan would be ready to go into effect at the time permitted by Texas law. If, under Texas law, the plan could not go into effect until July or August, the district court, in the exercise of its equity powers, could order such temporary relief as it deemed appropriate. *See Connor* v. *Coleman*, 440 U.S. 612, 614 (1979); *Reynolds* v. *Sims*, *supra*, 377 U.S. at 586.

Resolution of the case might, of course, take longer if the Attorney General found the plan objectionable and the county had either to reconsider it or await a ruling from the District Court of the District of Columbia. But Congress knew, when it established the Section 5 procedure and limited jurisdiction to the District of Columbia, that some delay would necessarily result from that procedure. It felt that the expertise of the Attorney General or the District of Columbia Court and the absence of local pressure made the continuation of exclusive jurisdiction desirable. *See* 121 CONG. REC. 16900-01 (1975), where the House defeated an amendment which would have eliminated the exclusive jurisdiction

of the District of Columbia. See also remarks on the floor of the Senate, 121 CONG. REC. 24717 (1975). Congress was of the view that Section 5 clearance was necessary, whether plans were legislatively adopted or court-ordered, in order to make certain that any new plan did not dilute the rights of minority voters. While necessary delay is unfortunate, delay is not in and of itself a reason to depart from the traditional view that legislation should be left to the legislature.

II. EVEN IF THE COURT PROPERLY ORDERED A PLAN TO BE SUBMITTED TO IT INITIALLY, IT WAS AN ABUSE OF DISCRETION TO APPROVE THE PLAN WITHOUT CLEARANCE UNDER SECTION 5.

Even if the order of October 2, 1979, directing submission of a plan to the court in November, 1979, be accepted as correct, it was an abuse of discretion for the district court to pass upon the plan without requiring clearance under Section 5. The legislative history of the 1975 extension of the Voting Rights Act makes it clear that Congress intended that, except in unusual circumstances, all plans, whether legislative or court-ordered, be subject to Section 5 clearance. Recognition and adherence to that expressed policy would be in accord with the decisions of this Court and would further the public interest. The court below was therefore correct in holding that the district court should not have passed on the constitutionality of the proposed plan until after the plan had been cleared under Section 5.

1. The Senate Report on the bill which became Public Law 94-73, the Voting Rights Act of 1975, is explicit as to its understanding of the relationship of Section 5 to court-ordered reapportionment. (S. Rep. No. 94-295, 94th Cong., 1st Sess. 18-19, *reprinted in* [1975]

U.S. CODE CONG. & ADM. NEWS 784-86.)[4] Citing with approval the decision in *Connor* v. *Waller*, *supra*, the report stated that the ruling "is consistent with the Committee's objective to utilize a form of primary jurisdiction for Section 5 review under which courts dealing with voting discrimination should defer in the first instance to the Attorney General or to the District of Columbia District Court." The report continues:

> Thus, for example, where a federal district court holds unconstitutional an apportionment plan which predates the effective date of coverage under the Voting Rights Act, any subsequent plan ordinarily would be subject to Section 5 review. In the typical case, the court either will direct the government body to adopt a new plan and present it to the court for consideration or itself choose a plan from among those presented by the various parties to the litigation. In either situation, the court should defer its consideration—or selection among—any plans presented to it until such time as the plans have been submitted for Section 5 review. Only after such review should the district court proceed to any fourteenth or fifteenth amendment question that may be raised.

(S. Rep., *supra*, at 18-19; [1975] U.S. CODE CONG. & ADM. NEWS at 784-85.)

The report interpreted this Court's decision in *Connor* v. *Johnson*, 402 U.S. 690 (1971) as dealing with the exceptional situation where, because of exigent circumstances, a court is required to fashion a plan itself. Even in that situation, the report pointed out, in fashioning

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[4] The report is on S. 1278 whereas the measure finally enacted arose out of H.R. 6219. The House bill was, however, essentially the same as S. 1279 and was used as the basis for debate and enactment by the Senate because of the need for expedition before the Voting Rights Act would expire. *See* 121 CONG. REC. 24116 (1975.)

the plan, a court should follow Section 5 standards. And it indicated the Committee's view that the exceptions should be rare by pointing out that, even where a court adopted a plan without clearance, if a state should later legislatively adopt the court-fashioned plan, Section 5 would apply. The reason for the primacy of Section 5, the report stated, was that the Attorney General and the District of Columbia Court, "as the experts in the area, have developed familiarity with the impact of discriminatory voting systems, and it is they who should assess the discriminatory impact of a system." S. Rep., *supra*, at 19.

While the House Report (H.R. Rep. No. 94-196) is not as explicit as the Senate report with respect to the relationship of Section 5 to orders in litigated cases, the House Report does make clear the importance which the House, as well as the Senate, attached to Section 5. The House Report stated (at 10) that continuation of Section 5 was necessary "to insure that any future practices will be free of discriminatory purpose and effect." It pointed out (at 11) that it would be ironical if the decisions mandating "one man, one vote" would be used to undercut the gains made by minorities, and stated that Section 5 was needed to make certain that there would be continued progress in this area. Similar remarks, essentially repeating the statements in the House Report, were made by supporters of the bill on the floor of the House. *See* 121 CONG. REC. 16244, 16247-48, 16251 (1975). An amendment to eliminate the requirement that Section 5 clearance be judicially obtained only from the District of Columbia court was defeated, 121 CONG. REC. 16900-01 (1975). Those opposing the amendment pointed out that concentration of such cases in the District of Columbia was needed, both to resist local pressure and to make use of the expertise acquired by the District of Columbia Court.

Since, as the Senate report noted (S. Rep., *supra*, at 16), it was only after 1970 that Section 5 came into extensive use and its importance was recognized, the reports and debates on the 1975 amendments were the first real opportunity Congress had to examine the actual operation of Section 5. Its understanding of the operation of that section, at a time when it not only extended its life, but made it applicable to jurisdictions (including Texas) not previously covered, renders this legislative history very pertinent to the judicial interpretation of Section 5.

2. Policy considerations, as well as the legislative history, dictate that this Court should direct the lower courts to fulfill the expectations of Congress that new apportionment plans in the area covered by the Voting Rights Act be subject to Section 5 clearance, whether resulting from legislative initiative or court orders. As discussed in Point I, such an approach is consistent with the established judicial policy of leaving the legislative process as much as possible to the legislature. On the other hand, Congress, when it enacted Section 5 (see *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966)), and when it extended it thereafter, decided that new plans could so subtly mask discrimination that a centralized body, applying consistent standards, was needed to make sure that reapportionment was not used as a means of disenfranchising minorities. It also, as discussed above, decided that it was necessary to centralize the authority to pass on plans in the District of Columbia, not only because of the expertise which that court had developed, but also because it felt that local judges would be subject to local prejudices and local pressure. Those considerations apply whether a new plan be legislatively adopted or court-ordered. Whatever delay may be involved in Section 5 clearance, Congress obviously thought that the need for consideration by a body with

consistent standards, removed from local pressures, was more important.

Petitioners argue that requiring clearance may result in indefinite delay by a recalcitrant legislature. However, a court is not, by requiring clearance, deprived of its general equity power to take measures to overcome undue delay. *See* pp. 9-10 *supra*. The suggestion that Section 5 should not apply to a district where the existing plan has already been deemed unconstitutional, since this may necessitate continuation, for a time, of a system officially adjudged improper, is not a convincing reason to disregard the clear intent of Congress. As discussed above, in most cases, where a legislature acts in good faith, clearance from the Attorney General could be obtained in short order. And even if some delay is involved, it is better to have an old bad system continued for a short time (*see Reynolds* v. *Sims*, *supra*, 377 U.S. at 585) than to have a new bad system put into effect for the indefinite future. It was the Congressional judgment that Section 5 clearance was essential to protect the rights of minorities under the Voting Rights Act. This Court should direct district courts to effectuate that Congressional intention, particularly since it is in accord with the judicial policy of avoiding, as much as possible, involving the courts in the legislative process.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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